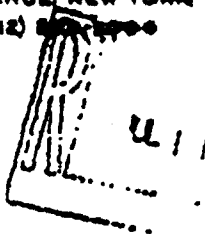


FISCHBEIN • BADILLO • WAGNER • ITZLER

308 THIRD AVENUE, NEW YORK, NY 10022

(212) 512-1000



July 6, 1996

Mr. Thomas J. Dunleavy  
Deputy Commissioner  
Department of Information Technology  
& Telecommunications  
75 Park Place  
New York, New York 10007

Mr. Thomas J. Dunleavy  
Deputy Commissioner  
Department of Information Technology  
& Telecommunications  
75 Park Place  
New York, New York 10007

Mr. Thomas J. Dunleavy  
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& Telecommunications  
75 Park Place  
New York, New York 10007

Mr. Thomas J. Dunleavy  
Deputy Commissioner  
Department of Information Technology  
& Telecommunications  
75 Park Place  
New York, New York 10007

Re: Cable Television Franchise Requirements

Dear Mr. Dunleavy:

We represent Liberty Cable Company, Inc. ("Liberty"), which has been providing cable television service to numerous buildings in New York City for the past several years. Indeed, Liberty provides the only meaningful competition to the established cable television companies operating in the City, such as Time Warner<sup>1</sup>.

Because Liberty does not utilize property owned by the City of New York to provide its cable television service, Liberty has been operating without a franchise or license from the City. The City of New York Department of Telecommunications and Energy ("DTE") has previously orally confirmed that Liberty is not required to obtain any license or franchise from the City. The purpose of this letter is to obtain written confirmation of this orally stated position.

The issue of whether a cable television system that does not utilize the property of the City is required to be licensed or franchised has been formally addressed by the DTE. The DTE, in response to an application for a cable license from the Russian American Broadcasting System ("RABS"), has previously held that if

<sup>1</sup> Even so, Liberty has only about 15,000 subscribers compared to Time Warner's 860,000.

July 6, 1994  
Page 2

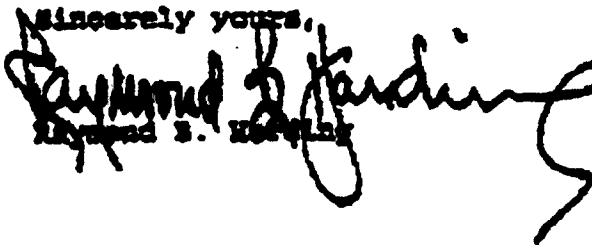
a cable television system does not utilize the "inalienable" property of the City, it was not required to be licensed by the DTE or to receive a franchise from the City. A copy of the RABS license application and the response of the DTE is attached hereto.

Like the RABS, Liberty does not utilize the inalienable property of the City for either public or private purposes. Like the RABS, Liberty transmits cable television service by means of microwave to various multifamily buildings. In doing so, Liberty does not use any public streets, rights of way or other property of the City to deliver its cable television service. Liberty's television service is subsequently carried by cable from the microwave antenna directly to the building residents, once again without the use of City property.

Liberty hereby requests the City's written confirmation that, like RABS, Liberty does not need a cable television franchise or license from the City to operate its cable television systems so long as Liberty does not use the inalienable property of the City for the provision of cable television service.

Thank you for your cooperation.

Sincerely yours,

  
Raymond S. Harding

RM:ch

Enclosure





DEPARTMENT OF INFORMATION TECHNOLOGY  
AND TELECOMMUNICATIONS

75 Park Place, 6th Floor  
New York, N.Y. 10007

VIA FAX

July 22, 1994

Raymond B. Harding, Esq.  
Fischbein Badillo Wagner Itzler  
909 Third Avenue  
New York, New York 10022

Re: Cable Television Franchise Requirements

Dear Mr. Harding:

As I told you when we spoke on July 12th and 19th, I referred your letter of July 6, 1994 to the Law Department for an opinion. Attached is a copy of the response dated July 21, 1994, which I received from Bruce Regal of the Corporation Counsel's office.

We are available to meet and discuss all aspects of cable television franchise requirements at your convenience.

Sincerely,



Thomas J. Dunleavy  
Deputy Commissioner

Attachment

c: Eileen E. Huggard, Esq.  
David E. Bronston, Esq.  
Bruce Regal, Esq.

R463



LAW DEPARTMENT

100 CHURCH STREET  
NEW YORK, N.Y. 10007  
Room 6D17  
PAUL A. CROTTY  
Corporation Counsel

(212) 788-1327

July 21, 1994

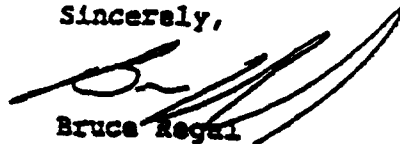
Thomas Dunleavy  
Department of Information Technology  
and Telecommunications  
75 Park Place - 6th Floor  
New York, New York

Dear Tom:

You have asked me to review a legal issue raised in a letter, dated July 6, 1994, which you received from a representative of Liberty Cable Company, Inc. ("Liberty"). The question raised is whether a microwave video transmission service such as Liberty requires a "franchise" (as that term is defined in federal law) from the City to operate. The answer, very briefly, is that such a "franchise" from the City is not required to provide a microwave transmission service unless such service uses cable or a similar closed transmission path to connect (whether across City streets or only using private property — see *F.C.C. v. Beach Communications, Inc.* 113 S. Ct. 2096 (1993)) buildings which are not commonly owned, controlled or managed.

I would be happy to provide you with a more complete legal analysis of the issues underlying this conclusion at your request.

Sincerely,



Bruce Regal  
Assistant Corporation Counsel





NEW YORK STATE COMMISSION ON CABLE TELEVISION

94-336

In the Matter of

Petition of Time Warner Cable of New York )  
City and Paragon Cable - Manhattan regarding )  
the operations of Liberty Cable Company, Inc. )

DOCKET NO. 90460

ORDER TO SHOW CAUSE

(Released: August 23, 1994)

PLEASE TAKE NOTICE that a proceeding is hereby commenced against Liberty Cable Company, Inc. (hereinafter "Liberty") for the alleged operation of a cable television system in four separate locations in the City of New York, Borough of Manhattan, County of New York, without a franchise and certificate of confirmation therefor as required by Sections 819 and 821 of the Executive Law.

Section 819(1) of the Executive Law provides, in pertinent part, that "no cable television system, whether or not it is deemed to occupy or use a public thoroughfare, may commence operations or expand the area it serves . . . unless it has been franchised by each municipality in which it proposes to provide or extend service."

Section 821(1) of the Executive Law provides, in pertinent part, that "no person shall exercise a franchise and no such franchise shall be effective until the commission has confirmed such franchise."

On or about May 31, 1994, the Commission received from Time Warner Cable of New York City and Paragon Cable - Manhattan (hereinafter "Time Warner" and "Paragon," respectively) a [request] for investigation of the provision of cable television service to residents of multiple dwelling buildings without a franchise or certificate of confirmation. Time Warner and Paragon alleged that Liberty is providing cable television service to residents of buildings located at or near: 229 East 79th Street; 535 East 86th Street; 420 East 54th Street (a/k/a River Tower) and 60 Sutton Place South; and 12 West 96th Street. Liberty has not obtained a franchise or certificate of confirmation for any of these locations.<sup>1</sup>

---

<sup>1</sup> Time Warner and Paragon operate franchised cable television systems in the City of New York. Said franchises were renewed by the City on June 27, 1990 and approved by this Commission on August 8, 1990 (Application of Manhattan Cable Television, Inc. for approval of a renewal of a franchise for the City of New York (Borough of Manhattan), Docket No. 30711, Order No. 91-060; Application of Paragon Cable Manhattan for approval of a renewal of a franchise for the City of New York (Borough of Manhattan), Docket No. 80712, Order No. 91-060.



On or about June 28, 1994, Liberty responded by its attorney, W. James MacNaughton. In its response, Liberty admitted that in some locations it has placed cable between residential buildings. Liberty did not identify specific locations. The company did indicate that the buildings located at 525 and 535 East 86th Streets were both managed by Kreisel Management.

Since receiving the petition of Time Warner and Paragon, staff from the Commission's Telecommunications Division conducted site inspections at two locations in Manhattan which were identified in the petition of Time Warner and Paragon. Specifically, on July 29, 1994, staff inspected premises at, and in the immediate vicinity of, 239 East 79th Street and 12 West 96th Street.

At 239 E. 79th Street, staff observed a coaxial cable running from the roof of the building across an alleyway to the rear of 232 East 80th Street. The same wire was attached to several buildings and lashed to Time Warner cable as it runs to the back of a parking garage situated 79th and 80th Streets at the corner of those blocks. At 12 West 96th Street, staff observed the interconnection of the building with 44 West 96th Street by a single wire running along the rooftops of intervening buildings. This wire was also observed alongside or lashed to the wire of the franchised cable company. From information obtained during the course of the inspection, staff understood the wire at both locations to belong to Liberty Cable.

Federal law defines a "cable system" as "a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community . . ." 47 USCA § 522(7). This definition excludes "a facility that serves subscribers in 1 or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities uses any public right-of-way." 47 USCA § 522(7)(B). It appears from our staff's investigation that Liberty is a "cable system" by definition. Moreover, it appears that Liberty's service at the locations described in this Order does not fall within the exception for a Satellite Master Antenna Television (SMATV) in 47 USCA § 522(7)(B).

#### THE COMMISSION ORDERS:

1. Liberty is hereby directed to Show Cause, in writing, by not later than September 18, 1994, why it should not be determined to be a cable television system subject to the requirements of Article 28 of the Executive Law, including the requirements for a franchise from the City of New York and a certificate of confirmation from the Commission; or, alternatively, why it should not be compelled to remove all interconnections by wire of buildings not commonly owned, controlled or managed and be ordered to and cease and desist from the provision of cable television service by means of such wires, whether now or in the future, to buildings not under common ownership, control or management, or on any public right-of-way and from providing service in any manner inconsistent with state and federal law until such time as Liberty shall have obtained a franchise and certificate of confirmation in accord with state law.

2. Liberty is entitled to an opportunity to be heard on the allegations herein and may avail itself of such opportunity by filing with the Commission on or before September 18, 1994 a written notice of appearance stating that it will appear at a hearing and present evidence as specified in this order. If the company fails to file an appearance within the time specified or, to respond in writing to the allegations herein, a final order shall be entered in this proceeding.

Commissioners Participating: William B. Finneran, Chairman; Gerard D. DiMarco, Barbara T. Rochman, David F. Wilber, III, Commissioners



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W. JAMES MacNAUGHTON, ESQ.  
*Attorney at Law*  
90 Woodbridge Center Drive • Suite 610  
Woodbridge, New Jersey 07095

Phone (908) 634-3700  
Fax (908) 634-7499

CITY OF NEW JERSEY  
OFFICE OF THE COMMISSIONER

94 OCT 31 P453

October 28, 1994

BY TELECOPIER AND REGULAR MAIL

Ralph A. Balzano, Commissioner,  
Department of Information Technology  
and Telecommunications  
75 Park Place, 6th Floor  
New York, NY 10007

Dear Commissioner Balzano:

Please be advised that my client, Liberty Cable Company, Inc. ("Liberty"), is interested in applying for a cable television franchise pursuant to the Resolution No. 1639 and applicable federal law.

Sincerely,

  
W. James MacNaughton

WJM:lw

Admitted in New Jersey and New York

A839



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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- X  
LIBERTY CABLE COMPANY, INC.,  
SIXTY SUTTON CORP. and BUD HOLMAN, : 94 Civ. 8886 (LAP)

Plaintiffs, :

v. :

THE CITY OF NEW YORK, RALPH A. BALZANO, : AFFIDAVIT OF  
Commissioner of Department of Informa- : ROOSEVELT MIKHAIL  
tion Technology and Telecommunications, :  
THE NEW YORK STATE COMMISSION ON  
CABLE TELEVISION, WILLIAM B. FINNERAN, :  
GERARD D. DiMARCO, BARBARA T. ROCHMAN, :  
DAVID F. WILBUR, and JOHN PASSIDOMO, :

Defendants. :

----- X  
STATE OF NEW YORK )  
: ss.:  
COUNTY OF NEW YORK )

ROOSEVELT MIKHAIL, being duly sworn, deposes and says:

1. I am Senior Vice President - Engineering and Technical Operations of Time Warner Cable of New York City ("TWCNYC"). I received my Bachelor of Science in Electrical Engineering degree from Cairo University in Egypt, and continued my post-graduate studies at Newark College of Engineering in Newark, New Jersey. I have been employed as an engineer by Time Warner and its predecessor company Warner Cable since 1974. I have been responsible for the design and construction of urban cable television systems in various parts of the United States, including, during the 1980s, three franchised 550 MHz systems in Brooklyn and Queens. Following the merger creating Time Warner, my responsibilities expanded to include all of the systems in New York City owned and operated by TWCNYC, including its southern Manhattan system.

2. I make this affidavit in opposition to the motion of Liberty Cable Company, Inc. ("Liberty") for a preliminary injunction and to respond to certain statements contained in the affidavits filed on behalf of Liberty. The opinions expressed herein are based on my professional knowledge and experience and information collected by members of my staff under my supervision, as well as information from Larry Pestana, Vice President of Engineering of Paragon Cable Manhattan ("Paragon"), TWCNYC's affiliate which owns and operates a franchised cable system in northern Manhattan.

3. Liberty's suggestion that it cannot serve buildings it now serves by cable directly by microwave is contradicted by Liberty's own actions. After the New York State Commission on Cable Television (the "Commission") issued its Order to Show Cause concerning Liberty's methods of operating, Liberty filed license applications with the FCC for 18 GHz receive sites at the very buildings identified by Time Warner as being served illegally by Liberty by means of cable interconnection, including 239 East 79th Street, 525 East 86th Street, and 44 West 96th Street. Liberty also filed an application for a receive site at "60 Sullon, NY." We have located no street or avenue in the directory of New York City streets that bears the name "Sullon." We suspect that this application may have been intended to refer to 60 Sutton Place South, one of the buildings identified in Time Warner's complaint to the Commission. A copy of Liberty's FCC applications for these buildings is attached hereto as Exhibit A.

4. Whether or not the "60 Sullon" application was intended for 60 Sutton Place South, it is clear that Liberty can serve that building directly by microwave without cable interconnection. For example, Liberty can use a transmitter at its existing transmission site on River Tower (420 East 54th Street), which building is adjacent to 60 Sutton Place South and taller than it, to send a radio signal to that building. A transmitting antenna could be installed closer to the edge of the River Tower roof looking down on 60 Sutton Place South.

5. In addition to the above referenced buildings which Time Warner identified in its complaint to the Commission, Liberty, on or about November 1, 1994, at the direction of the Commission, filed an Exhibit D which included other buildings it admitted to serving by cable interconnection. Time Warner was not able to obtain a copy of Liberty's Exhibit D until last week. (In December 1994, Liberty apparently filed a more complete list, but Time Warner still does not have a copy of it.) Comparison of Liberty's Exhibit D to the list of 18 GHz applications filed by Liberty with the FCC since 1991, compiled by Time Warner's FCC counsel based on their review of FCC public notices, indicates that Liberty has filed 18 GHz license applications to serve virtually all of the buildings Liberty currently admits to serving by cable interconnection, including: 120 East End Avenue (now apparently being served by cable interconnection with 510 East 86th Street), 425 East 58th Street (now apparently being served by cable interconnection with 400 East 59th Street), 860 and/or 866 UN Plaza (now apparently being



served by cable interconnection with one another), 55 Central Park West (now apparently being served by cable interconnection with 10 West 66th Street), 170 West End Avenue (now apparently being served by cable interconnection with 160 West End Avenue), 220 East 52nd Street (now apparently being served by cable interconnection with 211 East 51st Street).

6. While there are three buildings on Liberty's Exhibit D for which we have not found evidence of an FCC license application by Liberty -- 888 Park Avenue (which is apparently being served by cable interconnection with 898 Park Avenue), and 150 and 152 West 57th Street (Carnegie Tower) (both of which may be receiving signal by cable from the Parker Meridien Hotel located at 118 West 57th Street) -- there appears to be no technical reason why Liberty cannot serve all of these buildings directly by microwave.

7. While Liberty states that its headend facilities are located at Normandie Court on East 95th Street, that is not Liberty's only transmitter site. Based on the 18 GHz applications Liberty has filed at the FCC, it appears that Liberty currently has at least seven (7) transmitter sites in various locations in Manhattan, and applications pending for more. At many of these sites Liberty maintains multiple transmission paths. Like many communications companies (for example, cellular telephone companies), Liberty can lease transmitter sites at numerous locations throughout Manhattan and other areas of New York that it wishes to serve. Thus, if Liberty cannot currently obtain a clear line of sight to a desired destination from an existing transmitter, it can

obtain a clear line of sight from another rooftop or other location, access to which it can negotiate.

8. Liberty also attempts to obscure the fact that a transmitter need not, and typically does not, serve only one receive site. The signal from a single transmitter can be split with relatively little cost in 8 to 12 (or more) directions, depending on the amount of power used and the distance of the receive sites. By employing receivers equipped with low noise amplifiers ("LNAs"), the transmitter can be further split. A single transmitter site on the rooftop of a building may therefore accommodate multiple transmitters, each of which can be split multiple times. Based on our review of Liberty's FCC applications, it is apparent that Liberty already splits its signal at numerous transmitter locations. To extend its coverage even further, Liberty uses (and is capable of increasing its use of) repeaters, which are less expensive than transmitters. Thus, where a direct line of sight cannot be obtained from an existing transmitter to a prospective receive site, a repeater can be installed at an intermediate location, permitting the signal, in effect, to be bent so that it can reach the desired destination.

9. Liberty claims that there are 33 buildings that it would like to serve but cannot unless it is allowed to use cable interconnection. The only two such buildings identified in Liberty's affidavits (998 Fifth Avenue and 225 East 74th Street) can in fact both be served by Liberty directly by microwave. For example, Liberty has an existing microwave site at 1001 Fifth Avenue

and can easily aim a transmitter from that building to 998 Fifth Avenue. Liberty can transmit a microwave signal from its existing site at 207 East 74th Street to 225 East 74th Street.

10. Not only can a company like Liberty technically serve practically any apartment building without use of cable interconnection, it can serve a vast number of such buildings profitably. Based on cost information we have obtained from the suppliers of equipment used by multichannel video programming distributors like Liberty, Liberty can readily extend service to multiple apartment buildings using a single transmitter, without use of any cable interconnection, at a capital investment per building of approximately \$16,000, as demonstrated below:

Transmitter (1/10 of \$25k)	=	\$2,500
Transmit antenna		1,200
Receive antenna		1,500
Waveguide		180
Connectors		1,100
Microwave mount		1,000
Receiver		8,500
Total	=	\$15,980

11. Because Liberty typically enters into building-wide service contracts of 5 to 10 years' duration, under which Liberty receives guaranteed monthly payments for every apartment unit in the building (plus monthly revenues from premium services and pay-per-view programming ordered by individual tenants), Liberty should be able to serve even relatively small apartment buildings profitably

without use of cable interconnection. Over the course of a 10-year contract, a \$16,000 initial capital investment per building would be amortized at a rate of only \$1,600 per year.

12. Liberty believes that it can be more profitable if it uses cable to serve some buildings, but at the same time Liberty is claiming it is unconstitutional for it to be regulated as a cable operator. Liberty's contention based on its profitability is reminiscent of arguments made by franchised cable operators, including certain of Time Warner's predecessor companies, when they were constructing their systems. In certain areas of New York City, it would have been much less costly to string cable above ground, instead of trenching beneath the streets and burying the cable, as required by the City in areas without existing utility poles. In denying requests to allow cable operators to use the least costly method of installation, the City took the position that profitability must be gauged on the basis of an entire system, not on whether it is less profitable, or even unprofitable, to wire a particular building or portion of the City in the prescribed manner. Of course, Liberty if it chooses to remain an unfranchised multi-channel video programming distributor, is under no obligation to serve any unprofitable building.

  
Roosevelt Mikhail

Sworn to before me this  
30 day of January 1995.

  
Notary Public

HILDA M. CABAN  
Notary Public, State of New York  
No. 41-4518079  
Qualified in Queens County  
Commission Expires 10/31/96

A750



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NEW YORK STATE COMMISSION ON CABLE TELEVISION

In the Matter of

Petition of Time Warner Cable of New York City )  
and Paragon Cable-Manhattan regarding the )  
operations of Liberty Cable Company, Inc. )

Docket No. 90460

**NOTICE OF HEARING**

(Released: November 18, 1994)

On or about May 31, 1994, Time Warner Cable of New York City and Paragon Cable-Manhattan (hereinafter "TWCNYC") filed a complaint with this Commission against Liberty Cable Company, Inc. (hereinafter "Liberty") alleging illegal operation of a cable system. On July 29, 1994, Commission staff conducted site inspections at two locations in Manhattan where coaxial cable was observed connecting a building with a rooftop microwave reception antenna to at least one other building within the same block. On August 23, 1994, the Commission released an Order to Show Cause in this docket (Order No. 94-336) commencing this proceeding against Liberty for the alleged operation of one or more cable television systems in the Borough of Manhattan of the City of New York without a franchise and certificate of confirmation in contravention of Sections 819 and 821 of the New York State Executive Law.<sup>1</sup>

The Show Cause Order directed Liberty to demonstrate that it was not operating cable television systems at the said locations or, why it should not be compelled to remove all interconnected physical transmission lines until such time as it obtained a franchise and certificate of confirmation.

On November 1, 1994, Liberty filed an Answer and Appearance in this docket. It denied any wrongdoing but it admitted the interconnection of buildings by wire at certain locations in the City of New York including the locations cited in the Commission's Order to Show Cause. It claimed that such operations are not unlawful pursuant to state and federal law, and requested a hearing.

On November 7, 1994, TWCNYC filed an Appearance and Reply to Liberty's Answer wherein it concurred with Liberty's request for an evidentiary hearing but opposed any delay in the scheduling of that hearing.

---

<sup>1</sup> Federal statute also prohibits the operation of a cable television system without a franchise with two exceptions. 47 USC Section 541(b)(1). The exceptions are (1) the lawful provision of cable service without a franchise on or before July 1, 1984 where a franchising authority has not subsequently required a franchise and (2) the provision of cable service by a municipality or municipal authority. Neither exception appears to apply to Liberty Cable.

In addition to the allegation of illegal operation, TWCNYC and Liberty both allege that the other has engaged in anti-competitive conduct. TWCNYC alleges anti-competitive conduct by Liberty with reference to access and landlord inducements. In its Answer, Liberty refers generally to the "anti-competitive tactics" of TWCNYC.

In view of the request for a hearing by Liberty, the concurrence by TWCNYC, and in the interest of fairness, we have determined to hold a hearing on December 9, 1994 at 12:30 p.m. at the Commission's offices on the 21st Floor of the Corning Tower Building, Empire State Plaza in Albany, New York, or at such other adjourned time and place as deemed appropriate. We will receive documentary evidence and sworn testimony on the issues raised in the various papers and pleadings filed herein, particularly with reference to whether Liberty is illegally operating a system or systems at the referenced locations, and as to such further issues as seem relevant and appropriate.

We have determined that the City of New York by its Department of Information Technology and Telecommunications is an interested party to this proceeding and, as such, has been invited to appear and testify.

Witnesses will be sworn, testimony recorded, and the hearing held en banc by the Commission. Our Counsel is authorized to seek stipulations from the parties as to fact and law, and to seek briefing and statements in advance as to relevant facts and issues. Parties may request additional time for briefing following the hearing.

SO ORDERED.



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DEPARTMENT OF INFORMATION TECHNOLOGY  
AND TELECOMMUNICATIONS

75 Park Place, 6th Floor  
New York, N.Y. 10007

Telephone: (212) 764-4444  
Facsimile: (212) 764-6666

December 9, 1994

**VIA FACSIMILE**

Hon. William B. Finneran  
Chairman  
New York State Commission  
on Cable Television  
Tower Building, Empire State Plaza  
Albany, New York 12223

Re: Petition of Time Warner Cable of New York City and  
Paragon Cable Manhattan Regarding the Operations  
of Liberty Cable Company, Inc. - Docket No. 90460

Dear Chairman Finneran:

This is to apprise the New York State Commission on Cable Television ("Commission") that the City of New York is unable to make an appearance at today's hearing in the above-referenced proceeding.

In the Hearing Notice, dated November 18, 1994, the Commission stated that "[w]e have determined that the City of New York by its Department of Information Technology and Telecommunications is an interested party to this proceeding and, as such, has been invited to appear and testify." In a letter dated December 5, 1994, John Grow, Counsel, noted that "the Commission will expect that ... the City of New York address the alleged pending discussions concerning the potential franchising of Liberty Cable" at the hearing.

The Department of Information Technology and Telecommunications currently is considering various issues affecting cable system franchising in the City, and we are unable to testify as to these deliberations at this time.

Very truly yours,

Thomas J. Dunleavy  
First Deputy Commissioner

cc: John Grow, Esq.  
W. James MacNaughton, Esq.  
Martin J. Schwartz, Esq.